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**ICSID Arbitration Tribunal confirms it does not have jurisdiction in case brought by Lighthouse against Timor-Leste : arbitration declared closed**

On 22 December 2017, an arbitral tribunal constituted under the auspices of the International Centre for Settlement of Investment Disputes (**ICSID**) handed down its decision on jurisdiction in favour of the Democratic Republic of Timor-Leste (**Timor-Leste**). The arbitration concerned claims made against Timor-Leste by an Australian company, Lighthouse Corporation Pty Ltd, and a Seychellois company, Lighthouse Corporation Ltd IBC (together **Lighthouse**). Timor-Leste at all times maintained that ICSID did not have jurisdiction to hear and decide the dispute. The arbitral tribunal (**Tribunal**) has found that (i) it lacks jurisdiction over the present dispute; (ii) Lighthouse shall bear the entirety of the costs of the arbitration; (iii) Lighthouse shall pay USD 1,300,000 on account of Timor-Leste's legal fees and (iv) all other requests for relief are dismissed.

As a consequence of these findings, the Tribunal has declared the proceedings closed in accordance with ICSID Arbitration Rule 38(1).

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The arbitration was initiated against Timor-Leste by Lighthouse on 14 January 2015. The dispute concerns various fuel supply agreements between Timor-Leste and Lighthouse dating back to late 2010. The arbitration Tribunal was composed of three eminent international arbitrators: Mr Stephen Jagusch QC, who was appointed by Lighthouse, Professor Campbell McLachlan QC, who was appointed by Timor-Leste, and the President of the Tribunal, Professor Gabrielle Kaufmann-Kohler, who was appointed by the co-arbitrators.

On 13 February 2016, Timor-Leste was successful in having the case "bifurcated", or split into two phases (jurisdiction and merits). Subsequently, throughout 2016, Timor-Leste and Lighthouse exchanged written submissions in relation to jurisdiction. The Tribunal then convened a hearing on jurisdiction in Sydney (the first time an ICSID arbitration has been heard in Australia) from the 3rd to the 24th of February. At the hearing, oral testimony was given by Mr. Albert Jacobs for Lighthouse, Mr. Filipe Alfaiate (as Lighthouse's expert on Timor-Leste Law), Mr. Nuno Marrazes (as Timor-Leste's legal expert), His Excellency Kay Rala Xanana Gusmão, His Excellency Ambassador Abel Guterres, Mr. Craig Macaulay (Lighthouse's IT expert) and Mr.

Darren Hopkins (Timor-Leste's IT expert). Timor-Leste and Lighthouse subsequently filed further further written post-hearing brief submissions.

This bifurcation allowed the Tribunal to hear three arguments made by Timor-Leste as to why ICSID (and the Tribunal) did not have jurisdiction to hear and determine the substantive merits of the dispute.

First, Timor-Leste argued that it never consented to ICSID arbitration (the **First Objection - no consent to ICSID arbitration**).

Secondly, Timor-Leste argued that Lighthouse was not a "foreign investor" under Timor-Leste's Foreign Investment Law (**FIL**) and also did not hold a Special Investment Agreement (**SIA**) under those laws. Therefore Lighthouse was not afforded the protection of ICSID arbitration under the FIL (**Second Objection - Lighthouse not protected by FIL**)

Thirdly, Timor-Leste argued that there had been no “investment” by Lighthouse Parties for the purposes of the ICSID Convention (**Third Objection - "no investment" under ICSID**).

As explained in more detail below, the Tribunal found in favour of Timor-Leste and against Lighthouse in respect of Timor-Leste's First and Second Objections. On the basis of those findings, the Tribunal found that it was not necessary to determine the Third Objection.

<u>The Tribunal's analysis and findings in respect of the First, Second and Third Objections.</u>

In relation to the First Objection - no consent to ICSID arbitration, Timor-Leste argued that it had never agreed with Lighthouse that any disputes were to be referred to and decided by ICSID arbitration. Timor-Leste contended that the contractual documents relied on by Lighthouse had never been provided to Timor-Leste during or after negotiations, and that the evidence of Lighthouse, including two specific emails, were recent fabrications by the individual behind Lighthouse, Mr Albert Jacobs, which were created only after Lighthouse commenced the ICSID arbitration and Timor-Leste formally challenged jurisdiction.

After considering all of the legal arguments and evidence in extensive detail, the Tribunal made a series of significant findings in favour of Timor-Leste and against Lighthouse. These findings included the following statements by the Tribunal (referring to Timor-Leste as the Respondent and Lighthouse as the Claimants):

- On reviewing the record, the Tribunal finds that the Claimants have not established that there was a “common intent” to submit to ICSID jurisdiction. To the contrary, the record evidences an intent to resolve disputes through domestic court litigation, not through arbitration, let alone ICSID arbitration. (paragraph [233])

- Both before and after the first agreement was executed "the only dispute resolution mechanism contemplated by the Parties was remedies available under domestic law" ([235] and [237])

- Neither before nor after the conclusion of the Fuel Supply Agreement did the Parties intend to incorporate ICSID arbitration into their contract. [246]

- The Tribunal is not satisfied that the Standard Terms were supplied to the Respondent by the time of signing the Supply Agreement. [252]

- For there to be consent to ICSID jurisdiction through incorporation by reference, it must be demonstrated that the Parties intended to incorporate ICSID arbitration into their arrangements. Here, it has not been demonstrated to the Tribunal’s satisfaction that the Parties agreed to refer their disputes to ICSID arbitration. Moreover, not only is the reference to the document containing the ICSID dispute settlement clause ambiguous as to its intent, but it also has not been sufficiently established that the Respondent knew that the document existed or that it was supplied to the Respondent, or that it was discussed with the Respondent. [255]

- In the circumstances, the Tribunal determines that the Claimants have failed to demonstrate consent to ICSID arbitration as required under Article 25(1) of the Convention at the time of entering into the Supply Agreement. [256]

- In the present factual context, this mere reference to the unattached Standard Terms is insufficient to prove a common intent to incorporate a dispute settlement clause. [259]

- The Tribunal concludes that the references that are alleged by the Claimants to incorporate the Standard Terms into the Parties’ contractual arrangements are insufficient to demonstrate that the Parties have consented to ICSID arbitration. [268]

- Merely supplying a document with an ICSID arbitration clause, without more (for instance,

without evidence of acceptance of such a clause), would not meet the requirement of consent under the ICSID Convention. [268]

- The Tribunal is unable to rely on Mr. Jacobs' testimony to this effect. For one, Prime Minister Gusmão not only denies having discussed ICSID arbitration with Mr. Jacobs, but also denies receiving the Standard Terms at the meeting on 20 October 2010 (or at any other time). The Claimants have not provided any cogent corroborating evidence in support of Mr. Jacob's testimony in response. [270]

- In the circumstances, the Tribunal cannot accept Mr. Jacobs' testimony that he discussed ICSID arbitration with the Prime Minister at their meeting on 20 October 2010 or that he provided a copy of the Standard Terms to Prime Minister Gusmão at the meeting. [270]

- The record does not bear out the Claimants' contentions: … [272]

- It is notable that the Further Jacobs Email was only introduced into the record by the Claimants with the Reply. [275]

- Other evidence contradicts and is inconsistent with the Claimants' alleged version of events: … [277]

- As a consequence, the Tribunal reaches the conclusion that the Claimants have not established that they provided a copy of the Standard Terms to the Respondent. Neither have they proven that they supplied the December General Terms to the Respondent. This conclusion confirms the finding already made above that no ICSID arbitration clause was incorporated into the Parties' contractual arrangements. [278]

- The foregoing analysis buttresses the Tribunal's prior conclusion that the Claimants have not established that ICSID arbitration was incorporated into the Parties' contractual arrangements and that in consequence, the Claimants have not established that the Respondent has agreed by contract to arbitrate the present dispute before ICSID. [281]

- For the sake of completeness, the Tribunal notes that the Claimants' case would fail for another independent reason. The Standard Terms – which contained the ICSID dispute arbitration clause – allegedly existed before the Supply Agreement was signed. The Third Agreement was the last agreement executed between the Parties. Attached to the Third

Agreement was the October General Terms which provided for dispute resolution in local courts. [282]

In relation to the Second Objection - Lighthouse not protected by FIL, under Article 23 of Timor-Leste's Foreign Investment Law (**FIL**), disputes between the State and “foreign investors” under the FIL are settled through ICSID arbitration.

Timor-Leste argued that Lighthouse was not a "foreign investor" under the FIL and did not hold a Special Investment Agreement (**SIA**) under those laws. Additionally, Timor-Leste rejected the contention of Lighthouse that as foreign investors they were entitled to protection under the FIL in any event, including ICSID arbitration.

The Tribunal rejected Lighthouse's contention that although they did not have a "foreign investor's certificate", the FIL did not require that they hold one in order to obtain the benefits of the FIL, provided that Lighthouse had fulfilled the "material requirements" of the FIL.

The Tribunal further held that:

- It was evident from the Timorese Constitution that Timor-Leste intended to exercise administrative control on incoming foreign investments, and the FIL was enacted to ensure that purpose was met. [321]

- As foreign investment certificates are strictly regulated, it seems counterintuitive to suggest that an investor who does not comply with clear administrative requirements may nevertheless benefit from the FIL. The various provisions of the FIL, constituted with the existence of a Decree setting out the detailed rules, requirements and procedures for the application, assessment, approval or denial, and revocation of foreign investor’s certificates in Timor-Leste suggest that the requirement of these certificates is not to be disregarded. [321].

- There is no contradiction between Articles 2 and 3 of the FIL. These provisions make sense when read together: Article 2 applies to “foreign investments” which, by virtue of Articles 3(g) and 3(b), are made by “foreign investors” who have been issued a “foreign investor’s certificate”. [322]

- The so-called call-back power is limited to matters within the responsibility of a Ministry or Secretariat of State. There is no cogent evidence that this provision empowers the

Prime Minister to make decisions in areas that are within the competence of entities that are not mentioned, such as TradeInvest; nor is there any cogent evidence that this call-back power enables the Prime Minister to override the FIL and Government Decree 06/2005. The Tribunal therefore dismisses this argument. [326]

- In light of the clear text of Article 18 of the FIL, the Tribunal has no basis to conclude that the Fuel Supply Agreement is a SIA. [328]

- A resolution of the Council of Ministers is required for an agreement to qualify as a SIA under the FIL. [329]

- The Tribunal considers that Article 18(2) of the FIL clearly requires a resolution of the Council of Ministers for an agreement to be considered as a SIA, which is also borne out by the implementation of the provision. [330]

- Even if the Fuel Supply Agreement were to be considered a SIA, that would not be of any assistance to the Claimants. Article 23 of the FIL limits access to ICSID arbitration to "foreign investors", i.e. investors who hold a "foreign investor's certificate". The Claimants do not meet this requirement. [331]

- The Tribunal holds that neither of the Claimants qualifies as "foreign investor" under the FIL, and that the Fuel Supply Agreement does not constitute a "special investment agreement" under that same legislation. [332]

- The FIL sets out a specific framework of administrative control on inbound foreign investments. The benefits granted through the FIL, particularly consent to ICSID arbitration, are available only to those investors complying with the law's requirements. That does not include the Claimants. [333]

- On the basis of the foregoing analysis, the Tribunal concludes that Article 23 of the FIL does not provide a basis for the Respondent's consent to ICSID jurisdiction. [334]

In relation to the Third Objection - no "investment" under ICSID, Timor-Leste argued that the dispute does not "arise […] directly out of an investment" as required by Article 25 of the ICSID Convention. Timor-Leste argued that the meaning of "investment" under the ICSID Convention is objective and excludes ordinary commercial transactions and that the transaction in question is not an investment but rather an exchange of goods and services for payment.

The Tribunal found that it was unnecessary to determine this objection because it would make no difference to the final assessment of the Tribunal's jurisdiction.

As a result of these findings, the Tribunal held that Lighthouse should pay all of the costs of the arbitration, including ICSID and the Tribunal's fees, and pay USD1,300,000 towards Timor-Leste's legal costs.

The consequence of these findings meant that the Tribunal also formally declared the arbitration closed on 22 December 2017.

Timor-Leste has vigorously defended its national interests in this dispute. At the hearing, Timor-Leste was represented by senior government ministers, its counsel Vernon Flynn QC and Jonathan Kay Hoyle QC, and its solicitors DLA Piper.

Timor-Leste thanked the Tribunal members for the decision. Timor-Leste reaffirmed its respect for the role of ICSID in promoting international investment by balancing protections for investors and States, which was the basis on which Timor-Leste had signed the ICSID Convention. **ENDS**

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The International Centre for Settlement of Investment Disputes (**ICSID**) is an international institution for the settlement of investment disputes between States and nationals of other States. The ICSID investor-State dispute settlement mechanisms are fact-finding, conciliation and arbitration. ICSID has administered more than 600 investor-State disputes.

ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (**ICSID Convention**). The ICSID Convention was drafted by the Executive Directors of the World Bank to further the Bank's objective of international investment promotion. There are 161 Signatory and Contracting States to the ICSID Convention.

Timor-Leste signed the ICSID Convention on the 23rd of July 2002 and deposited its instrument of ratification on the same date. The ICSID Convention entered into force for Timor-Leste on the 22nd of August 2002.